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CASES NOTED

UNAUTHORIZED PRACTICE OF LAW—PATENT AGENTS

Petitioner, the Florida Bar Association, brought an original proceeding in the Florida Supreme Court¹ for punishment and restraint of an alleged unauthorized practice of law. Though not an "attorney at law," respondent had been duly admitted to practice before the Patent Office. At the time this action commenced respondent was maintaining an office in Florida, and was holding himself out to the public as a "patent attorney." *Held*, an individual admitted to practice before the Patent Office must qualify as a member of the state bar association before he can practice patent law in the State of Florida. *State v. Sperry*, 140 So.2d 587 (Fla. 1962).^{1A}

The judiciary has the inherent power to control and supervise the practice of law.² When the court is asked to restrain an individual from the unauthorized practice of law³ it becomes necessary for it to define the abstract term "practice of law" and to determine whether the alleged unauthorized practice falls within that definition.⁴ The courts in defining the limits of the legal practice have consistently broadened its scope far

1. Under Article V, § 23, of the Florida Constitution, the supreme court is granted "exclusive jurisdiction over the admission to the practice of law and the discipline of persons admitted." Petition of Fla. State Bar Ass'n, 134 Fla. 851, 186 So. 280 (1938), interpreted this article to imply the power to prevent the practice of law by those not admitted to practice. See: *Delaware Optometric Corp. v. Sherwood*, 128 A.2d 812 (Del. 1957); *People v. Goodman*, 366 Ill. 346, 8 N.E.2d 941 (1937); *State v. Butterfield*, 172 Neb. 645, 111 N.W.2d 543 (1961); *State v. Childe*, 147 Neb. 527, 23 N.W.2d 720 (1946); *New Jersey State Bar Ass'n v. Northern New Jersey Mortgage Associates*, 22 N.J. 184, 123 A.2d 498 (1956); *West Virginia State Bar v. Earley*, 144 W. Va. 504, 109 S.E.2d 420 (1959); *State v. Keller*, 16 Wis. 2d 377, 114 N.W.2d 796 (1962).

1A. *Cert. granted*, 31 U.S.L. WEEK 3079 (U.S. Sept. 11, 1962).

2. *E.g.*, *De Pass v. B. Harris Wool Co.*, 346 Mo. 1038, 144 S.W.2d 146 (1940); *State v. Childe*, *supra* note 1; *Battelle Memorial Institute v. Green*, 84 Ohio L. Abs. 353, 173 N.E.2d 201 (1960); *West Virginia State Bar v. Earley*, *supra* note 1; 5 AM. JUR. ATTORNEYS § 2 (1936).

3. The unauthorized practice of law is punishable by either contempt, *e.g.*, *Delaware Optometric Corp. v. Sherwood*, 128 A.2d 812 (Del. 1957); *People v. Tinkoff*, 399 Ill. 282, 77 N.E.2d 693 (1948); or by injunction, *e.g.*, *Auerbacher v. Wood*, 139 N.J. Eq. 599, 53 A.2d 800 (1947), *aff'd*, 142 N.J. Eq. 484, 59 A.2d 863 (1948); *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 193 N.E. 650 (1934); or possibly a combination of the two, *e.g.*, *State v. Sperry*, 140 So.2d 587 (Fla. 1962); *Idaho State Bar v. Meservy*, 80 Idaho 504, 335 P.2d 62 (1959).

4. The term "practice of law" involves not only the doing or performing of services in a court of justice, *In re Matthews*, 57 Idaho 75, 62 P.2d 578 (1936); *In re Droker*, 370 P.2d 242 (Wash. 1962); but in a larger sense includes conveyancing, *Land Title Abstract & Trust Co. v. Dworken*, *supra* note 3; preparation of legal instruments, *Idaho State Bar v. Meservy*, *supra* note 3; offering advice to clients, *State Bar Ass'n of Conn. v. Connecticut Bank & Trust Co.*, 145 Conn. 222, 140 A.2d 863 (1958); and all action taken for them in matters connected with the law, *Land Title Abstract & Trust Co. v. Dworken*, *supra* note 3.

beyond services performed in a court of justice, to include activities of many nonlitigious fields which entail specialized knowledge and ability.⁵

Thus far, only three cases⁶ have dealt with the question of whether practice before the Patent Office does in fact involve the practice of law.⁷ The courts do not quarrel with the power of the Federal Patent Office to admit non-attorneys to practice before it, but in declaring the activities of the patent agent as being in fact a "practice of law," they do challenge the right of the patent agent to conduct that practice within their respective borders.⁸ In line with this power most states have legislation restricting the practice of law to members of their bar associations.⁹

5. *New Jersey State Bar Ass'n v. Northern New Jersey Mortgage Associates*, 32 N.J. 430, 161 A.2d 257 (1960).

6. In *Chicago Bar Ass'n v. Kellogg*, 338 Ill. App. 618, 88 N.E.2d 519 (1949), the court enjoined the defendant from (1) giving legal advice, (2) preparing, drafting and construing legal documents, (3) rendering legal opinions including those as to patent rights and infringements, (4) preparation of legal documents for proceedings in tribunals other than the Patent Office, (5) asserting attorney's lien under Illinois statute, and (6) charging and collecting fees for legal services. A few years later in *Marshall v. New Inventor's Club, Inc.*, 69 Ohio L. Abs. 578, 117 N.E.2d 737 (1953), the Ohio Common Pleas Court enjoined (1) rendering opinions as to patentability, (2) preparing applications for letters patent, (3) preparing amendments for letters patent, and (4) drafting of contracts, affidavits and assignments. Finally, *Battelle Memorial Institute v. Green*, 84 Ohio L. Abs. 353, 173 N.E.2d 201 (1960), an action for declaratory judgment, followed the above case by holding that Ohio had the right to enjoin activities which it found to be within the definition of "practice of law."

7. "The patent attorney's work before the Patent Office consists in the main of the following duties:

"1. The preparation of a complete description of the invention in a more or less prescribed form, known as the specification.

"2. The preparation of the claims, which are intended to define the scope of the patent which is eventually granted.

"3. The preparation of formal drawings from which, in connection with the specification, the invention and its mode of use can be understood (such drawings are not always necessary, e.g., in many chemical cases):

"4. The revision of the claims in the light of prior disclosures cited by the Patent Examiner so as to define patentable novelty over such disclosures.

"5. The presentation of arguments as to why the differences between the subject matter shown and claimed in the application is patentable over earlier disclosures.

"6. The prosecution of interferences, which are declared when two different applicants disclose and claim the same patentable invention. This includes the preparation of the preliminary statement, the bringing of motions, the taking of testimony by deposition, and the briefing and oral argument based on such testimony." Bailey, *Practice by Non-Lawyers Before the United States Patent Office*, 15 FED. B.J. 211, 213-14 (1955). See also *Topliff v. Topliff*, 145 U.S. 156, 171 (1892) wherein the court stated, "The specification and claims of a patent, particularly if the invention be at all complicated, constitute one of the most difficult legal instruments to draw with accuracy."

8. *Chicago Bar Ass'n v. Kellogg*, 338 Ill. App. 618, 88 N.E.2d 519 (1949); *Battelle Memorial Institute v. Green*, 84 Ohio L. Abs. 353, 173 N.E.2d 201 (1960); *Marshall v. New Inventor's Club, Inc.*, 69 Ohio L. Abs. 578, 117 N.E.2d 737 (1953).

9. E.g., ALA. CODE tit. 46, § 31 (1958); ALASKA COMP. LAWS ANN. § 35-2-77 (1949); COLO. REV. STAT. § 12-1-17 (1954); CONN. GEN. STAT. § 51-88 (1960); GA. CODE ANN. § 9-402 (1936); HAWAII REV. LAWS § 217-14 (1955); IDAHO CODE ANN. § 3-420 (1948); IND. ANN. STAT. § 4-3601 (1933); MINN. STAT. ANN. § 481.02 (1958); NEB. REV. STAT. § 7-101 (1943); N.H. REV. STAT. ANN. § 311.9 (1955); S.D. CODE § 32.1121 (1939); TENN. CODE

Two cases have implied a contrary result. The Colorado court, in *People v. Erbaugh*,¹⁰ enjoined a patent agent from use of the title "attorney," apparently contending that practice before the Patent Office is not the practice of law.¹¹ A more recent decision giving support to this conclusion is *Zenith Radio Corp. v. Radio Corp. of America*,¹² wherein the court, by dicta, stated that since laymen are permitted to practice before the Patent Office, the work is not legal in nature.¹³

In the instant case¹⁴ the Florida Supreme Court relied heavily on *Chicago Bar Ass'n v. Kellogg*.¹⁵ The court ordered that until Sperry became a member of the Florida Bar he was permanently enjoined from using the term "patent attorney"; giving legal opinions, including those as to patentability or infringement; preparing, drafting or construing legal documents; preparing and prosecuting applications for letters patent, and amendments thereto; and otherwise engaging in the practice of law. The court went on to say that this injunction was not to be construed as affecting any rights which the respondent has to practice before the Patent Office outside of Florida.¹⁶ This was the most prohibitive decision by any state thus far, and left the respondent virtually powerless to carry on any form of Patent Office practice within the confines of Florida.

As part of his defense the respondent contended that an injunction would be violative of the Fourteenth Amendment to the United States Constitution, in that it would deprive him of the ability to earn a living and deprive him of property without due process of law.¹⁷ This was the first time that a constitutional defense had been raised in a Patent Office practice case. While on its surface this argument would appear

ANN. § 29-303 (1956); WASH. REV. CODE ANN. § 2.48.180 (1961); WIS. STAT. ANN. § 256.30 (1957).

10. 42 Colo. 480, 94 Pac. 349 (1908).

11. *Ibid.*

12. 121 F. Supp. 792 (1954).

13. There are many decisions concerning federal and state administrative agencies other than the Patent Office. Some of these decisions which are in accord with the majority herein are: *Petition of Kearney*, 63 So.2d 630 (Fla. 1953); *People v. Goodman*, 366 Ill. 346, 8 N.E.2d 941, 111 A.L.R. 1 (1937); *State ex rel. Johnson v. Childe*, 139 Neb. 91, 295 N.W. 381 (1941); *In re Roel*, 3 N.Y.2d 224, 165 N.Y.S.2d 31, 144 N.E.2d 24 (1957); *Richmond Ass'n of Credit Men v. Bar Ass'n*, 167 Va. 327, 189 S.E. 153 (1937); *West Virginia State Bar v. Earley*, 144 W. Va. 504, 109 S.E.2d 420 (1959); *State v. Keller*, 16 Wis. 2d 377, 114 N.W.2d 796 (1962). *Contra*, *Noble v. Hunt*, 95 Ga. App. 804, 99 S.E.2d 345 (1957); *Matter of Lyon*, 301 Mass. 30, 16 N.E.2d 74 (1938); *De Pass v. B. Harris Wool Co.*, 346 Mo. 1038, 144 S.W.2d 146 (1940); *Auerbacher v. Wood*, 139 N.J. Eq. 599, 53 A.2d 800 (1947), *aff'd*, 142 N.J. Eq. 484, 59 A.2d 863 (1948). See also *Von Baur, The Practice of Non-Lawyers Before Administrative Agencies*, 15 FED. B.J. 99 (1955); *Comment*, 1 DE PAUL L. REV. 108 (1951).

14. *State v. Sperry*, 140 So.2d 587 (Fla. 1962).

15. 338 Ill. App. 618, 88 N.E.2d 519 (1949).

16. *Compare State v. Sperry*, 140 So.2d 587, 596 (Fla. 1962) with *Chicago Bar Ass'n v. Kellogg*, *Battelle Memorial Institute v. Green*, and *Marshall v. New Inventor's Club*, *supra* note 6.

17. *State v. Sperry*, 140 So.2d 587, 596 (Fla. 1962).

to have merit, the Florida bench had little trouble in disposing of the contention.¹⁸

In justifying its injunction the court denied any attempt to protect the legal profession from competition and relied on its obligation to the public to protect it from incompetent legal representation.¹⁹ However, when one considers the American concept of dual citizenship, this would appear to be an obligation of not only the individual states, but the federal government as well. Therefore, the qualifications exacted by the Patent Office would appear to be for the purpose of public protection.²⁰

It would seem to this author that the decision would stand on firmer ground had the court also relied on the idea of protecting the legal profession. This concept is in no way distasteful nor bears an unethical aura about it. The American Medical Association and similar professional groups have taken great pains to protect their own. In light of the many inroads made on the legal profession on the part of banks in the field of trusts, accountants in the area of tax, insurance companies in estate planning, realtors and title companies in the realm of real estate law, and others, it would seem a highly commendable activity on the part of the American Bar Association and its state subsidiaries to thwart these and further infringements. Moreover, the result of such an endeavor

18. "The justification for excluding from the practice of law persons who are not admitted to the bar and for limiting and restricting such practice to licensed members of the legal profession is not the protection of the members of the bar from competition or the creation of a monopoly for the members of the legal profession, but is instead the protection of the public from being advised and represented in legal matters by unqualified and undisciplined persons over whom the judicial department of the government could exercise slight or no control." *West Virginia State Bar v. Earley*, 144 W. Va. 504, 527, 109 S.E.2d 420, 435 (1959); *Accord*, *State Bar Ass'n of Conn. v. Connecticut Bank & Trust Co.*, 20 Conn. Supp. 248, 131 A.2d 646 (1957); *Keyes Co. v. Dade County Bar Ass'n*, 46 So.2d 605 (Fla. 1950); *Petition of Fla. State Bar Ass'n*, 134 Fla. 851, 186 So. 280 (1938); *People v. Goodman*, 366 Ill. 346, 8 N.E.2d 941 (1937); *Matter of Lyon*, 301 Mass. 30, 16 N.E.2d 74 (1938); *Hulse v. Criger*, 363 Mo. 26, 247 S.W.2d 855 (1952); *New Jersey State Bar Ass'n v. Northern New Jersey Mortgage Associates*, 32 N.J. 430, 161 A.2d 257 (1960); *McMillen v. McCahan*, 167 N.E.2d 541 (C.P. Ohio 1960). It should be noted that this exclusion of laymen is in no way violative of the due process clause in our Federal Constitution. In *Petition of Fla. State Bar Ass'n*, *supra* at 289, the court stated that "practice of the law is not an inherent right. It is a privilege or franchise granted by the state . . ." and in *Ginsburg v. Kovrak*, 392 Pa. 143, 139 A.2d 889 (1958), the court succinctly pointed out that "The right to practice law in State courts is not such a privilege or immunity as is guaranteed by the Fourteenth Amendment." These two decisions are buttressed by *Duncan v. Missouri*, 152 U.S. 377 (1894); *State Bar Ass'n of Conn. v. Connecticut Bank & Trust Co.*, *supra*; *Christy Case*, 362 Pa. 347, 67 A.2d 85 (1949).

19. *State v. Sperry*, 140 So.2d at 595 (Fla. 1962).

20. "The Commissioner, subject to the approval of the Secretary of Commerce, may prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office, and may require them, before being recognized as representatives of applicants or other persons, to show that they are of good moral character and reputation and are possessed of the necessary qualifications to render to applicants or other persons valuable service, advice, and assistance in the presentation or prosecution of their applications or other business before the Office." 35 U.S.C. § 31 (1959).

would very definitely be public protection; for the public would thereafter be assured of competent legal representation in the various areas of the law. Protection of the legal profession by its very nature is protection of the public.

In light of this decision it may be assumed that the Florida Bar Association will take further steps to prohibit existing infringements.

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ASSESSMENT—REQUIREMENT OF FULL CASH VALUE AND ITS JUDICIAL INTERPRETATION

A corporate property owner filed suit to enjoin the tax collector of Palm Beach County from collecting taxes against its real property, alleging that the assessment was illegal on the ground that similar properties in the county were assessed at a much lower valuation. The corporation did not allege that its property was assessed in excess of its full cash value. The trial court denied the county's motion to dismiss for failure to state a cause of action. On appeal, *held*, reversed: since the adoption of the homestead exemption, the practice of assessing property has conformed with the statutory requirement of full cash value, and a taxpayer who fails to allege a valuation in excess of full cash value has not stated a cause of action. *Sproul v. Royal Palm Yacht & Country Club, Inc.*, 143 So.2d 900 (Fla. 2d Dist. 1962).

Although the legislature has imposed the requirement of assessment at full cash value,¹ for a number of years after the passage of the statute it was nevertheless held to be common knowledge that assessments were far below the statutory mandate.² These assessments, however, were upheld on the ground that the purpose of the statute was to create uniformity and equality of burden³ pursuant to the constitutional requirement.⁴ Consequently, if all property was assessed at fifty per cent of its full cash value, a nominal infraction of the statute was not a ground for a court of equity to grant relief.⁵ This result accorded with the general

1. FLA. STAT. § 193.11 (1961). "The county assessor of taxes shall assess all property at its full cash value."

2. *Henderson v. Leatherman*, 120 Fla. 496, 507, 163 So. 310, 314 (1935): "[I]t is a matter of common knowledge that lands nowhere in this state are assessed for state and county purposes at more than 50 per cent of their cash value." *Camp Phosphate Co. v. Allen*, 77 Fla. 341, 81 So. 503 (1919).

3. In *Camp Phosphate Co. v. Allen*, 77 Fla. 341, 351, 81 So. 503, 507 (1919), the court stated: "[W]hile it involves a nominal departure from the letter of the law, [it] does injury to no one, and secures the uniformity of tax burden which was the sole end of the Constitution."

4. FLA. CONST. art. IX, § 1 requires the legislature to provide for a "uniform and equal rate of taxation . . . [and to] secure a just valuation of all property, both real and personal"

5. "[A]s it is a matter of common knowledge that the several assessors of this State . . .